Supreme Court, U.S.
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No. 00-

IN THE
SUPREME COURT OF THE UNITED STATES

VERNON VICTOR PRATHER, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the federal statute making it an offense to distribute a listed (precursor) chemical "knowing" or having "reasonable cause to believe" that the precursor "will be" used to manufacture a controlled substance, may the alternative knowledge element be established by application of the "willful blindness" doctrine?

2. Is it sufficient to prove a violation of 21 U.S.C. § 841(d)(2), which prohibits distribution of a listed (precursor) chemical "knowing" or having "reasonable cause to believe" that the chemical "will be" used to manufacture a controlled substance, that the defendant had knowledge at the time of the distribution that the recipient had "the present intent to" manufacture, as held by the court of appeals, or must the government show that the precursor was in fact subsequently used to manufacture an illegal drug?

3. To prove a violation of the clause of 21 U.S.C. § 841(d)(2) which prohibits distribution of a listed (precursor) chemical despite "reasonable cause to believe" that the product will be used to manufacture a controlled substance, must the government prove that the defendant acted "in bad faith," as held in earlier cases of this Court construing the same language?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Vernon Victor Prather, Jr., and the United States).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

VERNON VICTOR PRATHER, JR., respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit filed and entered on March 7, 2000.

OPINIONS BELOW

The Opinion of the Court of Appeals (per Barkett, J., with Carnes and Marcus, JJ.), was filed March 7, 2000. It is published as United States v. Prather, 205 F.3d 1265, and is reproduced in Appendix A. The district court did not publish or write any pertinent opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit affirming the applicant's convictions and sentence (in all but one minor respect) was filed and entered on March 7, 2000. See Appx. A. A timely petition for rehearing was denied by two Orders filed April 28, 2000. Appendix B. This petition is timely filed within 90 days thereafter, that is, on or before July 27, 2000. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

At the time of the conduct underlying this case, section 841 of title 21, United States Code, provided,[1] in pertinent part:

> **(d) Offenses involving listed chemicals**
>
> Any person who knowingly or intentionally --
>
> (1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;
>
> (2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title [sic]; or
>
> (3) with the intent of causing the evasion of the record-keeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;
>
> shall be fined in accordance with Title 18, or imprisoned not more than 10 years, or both.

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[1] The statute has since been amended in certain immaterial respects.

STATEMENT OF THE CASE

This petition presents important questions concerning the interpretation of the criminal provisions of the federal drug laws. In upholding the petitioner's convictions, the court below construed § 841(d) in a manner contrary to this Court's precedents and dangerous to legitimate businesses which produce and distribute pseudoephedrine and other listed chemicals. The court of appeals also allowed an unauthorized extension of the "willful blindness" doctrine.

a. Procedural History

Petitioner Victor Prather was convicted after a jury trial in the Northern District of Georgia on several counts of an 18-count indictment charging that he, X-Pressive Looks, Inc. ("XLI"), and one Daniel Matta distributed pseudoephedrine, a nonprescription pharmaceutical which is a listed chemical,[2] "knowing, or having reasonable cause to believe" that the drug would be used to make methamphetamine. 21 U.S.C. § 841(d)(2). He was also convicted of conspiracy to violate § 841(d) from an unknown date until "at least" February 1996, and of conducting monetary transactions with the proceeds of the controlled substance offenses. 21 U.S.C. § 846; 18

[2] See 21 U.S.C. § 802(33) (defining "listed chemical"), § 802(34)(K) (initial list); 21 C.F.R. § 1310.02(a)(11) (current classification). In general, while not meeting the definition of a "controlled substance" themselves, "listed chemicals" are useful precursors for the manufacture of illegal psychoactive drugs. However, a "listed chemical," like pseudoephedrine, may also have common, lawful uses; in this case, pseudoephedrine is widely used as a nasal decongestant, sold over the counter under such brand names as "Sudafed."

U.S.C. § 1957.[3] The indictment further charged criminal forfeitures under 21 U.S.C. § 853 predicated on § 841(d) violations, and of funds involved in § 1957 transactions, under 18 U.S.C. § 982.

The trial lasted ten days; the jury deliberated for another three, during which supplemental instructions were delivered. On February 13, 1998, the jury found Prather guilty on Counts One and Four through Eighteen, while acquitting him on Counts Two and Three. He was then detained, and his subsequent motion for release was not granted.

The jury was asked to and did specify the mental state it found as to each count. On nine of ten § 841(d) counts, the jury found that petitioner distributed the pseudoephedrine with knowledge of how it "would be used"; on one count, only with "reasonable cause to believe" it.

The judge imposed a sentence of 168 months' (14 years') imprisonment, with three years' supervised release, a $175,000 fine and $1600 in special assessments.[4] The judgment was filed August 13, 1998.

Petitioner filed a timely Notice of Appeal. In a for-publication opinion, the Eleventh Circuit affirmed the convictions and sentence except that it directed correction of an ex post facto violation in the rate of special assessments. Appx. A.

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[3] See 18 U.S.C. § 1957(f)(3), adopting id. § 1956(c)(7), incorporating id. § 1961(1), including 21 U.S.C. § 841(d).

[4] The court initially imposed $800, but on suggestion of the Probation Officer changed the amount to $1600 based on $100 per count. On appeal, the court determined on ex post facto grounds that $800 was the correct amount and remanded for correction, Appx. A12-13, which has since been accomplished.

b. Statement of Facts

Established in Florida in 1991, X-Pressive Looks, Inc. ("XLI") sold over-the-counter drugs and novelty items by mail. In 1994 and 1995 its business had evolved to be overwhelmingly the distribution of pseudoephedrine, used legally as a nasal decongestant. XLI distributed pseudoephedrine in 1000-tablet bottles, selling them in wholesale lots.

An expert testified that one method for manufacturing methamphetamine employs quantities of pseudoephedrine. XLI's principal wholesale customers were California "head shops," but some XLI customers were individuals. XLI's pseudoephedrine sales between April 1994 and August 1995 reached over 830 million tablets, weighing nearly 50,000 kilograms. Petitioner owned XLI as a subchapter C corporation.

In addition to gifts, books and t-shirts, Valley II Varieties ("V2V"), a novelty shop, and its outlet "OTC" sold drug paraphernalia, including a book on how to manufacture methamphetamine. V2V also sold pseudoephedrine; some was obtained from XLI between July or August 1994 and October 1995. Petitioner visited V2V twice. That Place, another California gift shop, also sold drug paraphernalia. That Place bought from two to twenty cases of XLI pseudoephedrine weekly. The shopkeepers who testified did not recount any conversation with petitioner about knowing or believing that their customers might be buying pseudoephedrine to make methamphetamine.

A witness from Clifton Labs, supplier to XLI beginning in October 1994, testified that Prather conceded a "concern" about his product's turning up in "clandestine labs." Petitioner said he was "not sure" or "not positive" about 30-50% of his customers.

Two methamphetamine manufacturers, Michael Mitchell and Alberto Saa, also testified.[5] Mitchell said that he began to purchase three to five cases of pseudoephedrine from XLI at a time for the purpose of manufacturing methamphetamine in his garage. He dealt initially with "Billy" (a name some witnesses said Prather used at work) and later with Dan Matta. Mitchell did not want Prather to know of his manufacturing activity, and "play[ed] stupid" on the subject of methamphetamine in his conversations with "Billy."

Saa called XLI in late 1994 after seeing its name on a label and inquired about ordering 100 cases a week, to be shipped to a home address. "Billy" told Saa it was not a good idea to purchase pseudoephedrine that way, because it would attract police attention, and refused to sell to him, referring Saa instead to nearby V2V. Saa's purpose for buying pseudoephedrine was to manufacture methamphetamine, but he never told "Billy" this, because Saa would not "advertise" his illegal purpose. V2V was able to fulfill Saa's needs; he paid in cash. V2V sold to Saa "between five and ten times" over a six-month period.[6] Saa also bought pseudoephedrine at That Place.

Witnesses from V2V and That Place testified that in April 1995 they received a notice in the mail from the DEA which they faxed to petitioner. The notice said that

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[5] Another witness, David Batiz, using the false names, purchased quantities of pseudoephedrine from petitioner on behalf of "a gentleman" he met in a bar, whom he knew only by a first name. Batiz told XLI he was reselling to hospitals.

[6] No witness attempted to give dates for these sales. Only one of the sales to Saa by Valley Varieties was identified in any way with XLI's product.

pseudoephedrine was being seized at clandestine methamphetamine labs and that bulk pseudoephedrine was being used to make methamphetamine. Soon after, petitioner faxed his customers an opinion letter from a New York law firm, which described laws and regulations regarding sales of pseudoephedrine.

Five former XLI employees testified. Co-defendant Matta, who pleaded guilty to conspiracy, worked on wholesale orders and opened a California office for XLI. Matta said that XLI had no hospital or chiropractic customers, but Matta admitted he visited one XLI pharmacy customer. Over a motion for mistrial, Matta was permitted to opine that he "had reasonable cause to believe" XLI's pseudoephedrine was being diverted to manufacture methamphetamine.

Another former employee said that petitioner told her in March or April 1995 that pseudoephedrine could be used to make methamphetamine, but that he always wanted to comply with the law.[7] Two others said that petitioner told them from the first it was not appropriate to ask customers what they were doing with the pseudoephedrine.[8] DEA and IRS agents, respectively, testified about searches conducted at XLI locations, and detailed the monetary transactions charged in the § 1957 counts.

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[7] On the seventh day of trial, after hearing shopkeeper, drug manufacturer and employee witnesses, Judge Forrester commented that there was as of that time "no evidence" of actual knowledge, and so there was not "enough evidence to go to the jury" on that theory.

[8] This testimony was directly contradicted and impeached by the defendant's investigator.

Petitioner testified extensively in his own defense. A defense expert described the several legitimate uses of pseudoephedrine.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)

The United States District Court for the Northern District of Georgia had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed there. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

REASONS FOR GRANTING THE WRIT

1. The decision below expands the application of the "willful blindness" doctrine beyond this Court's cases, beyond its logic, and in disregard of the apparent intent of Congress in this statute.

The opinion below affirms the use of a "willful blindness" charge in this case on the basis of precedent broadly stating that "This C[ircuit] has consistently recognized deliberate ignorance of criminal activity as the equivalent of knowledge." Appx. A8, quoting United States v. Arias, 984 F.2d 1139, 1143 (11th Cir. 1993) (with internal quotation marks omitted). This Court, however, has not "consistently recognized" any such thing, and the Circuits are divided on several key issues in the proper formulation of a "willful blindness" instruction, creating an intolerable unevenness in the application of the doctrine nationally. This Court's intervention is essential; certiorari should be granted.

The trial court charged the jury in this case, consistent with the statute, 21 U.S.C. § 841(d)(2), that it could find petitioner guilty either on the basis of actual knowledge of a customer's proposed use of the pseudoephedrine he distributed, or on the basis of his having had "reasonable cause to believe" that the chemical he distributed would be misused to manufacture methamphetamine. Over objection, the court also charged that the jury could rely on a theory of "willful blindness" or "deliberate ignorance"[9] as a way of finding knowledge. Because special verdicts were received, the record shows that the jury found "knowledge" rather than "reasonable cause to believe" on all but one count. The opinion of the court below fails to consider the reasons why Congress cannot be deemed to have intended a "willful blindness" alternative in cases under § 841(d)(2). For this reason, and because of the importance of carefully defining any doctrine under which statutory criminal liability is judicially expanded, this petition for certiorari should be granted.

Willful blindness is not inherently part of the legal definition of "knowingly," but is rather a sort of judicially-recognized alternative to it, necessarily applicable only when and where Congress intended to incorporate that body of case law. This Court, for example, has had no trouble discerning such legislative intent in ordinary cases of possession or importation of contraband. This principle is illustrated in a trilogy of cases in which this Court analyzed certain legislated presumptions of knowledge in

[9] The two terms are used interchangeably here, as they generally are. See Note (J. Marcus), *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 Yale L.J. 2231, 2231 n.1 (1993).

general intent criminal statutes. In Leary v. United States, 395 U.S. 6 (1969), this Court struck down a statutory presumption that a person "knows" marijuana is imported if he transports it, under a 1956 statute prohibiting the knowing transportation of imported marijuana. See 21 U.S.C. § 176a (repealed).

In the course of its discussion, the Leary Court footnoted the word "knows" and inserted this comment:

> Nothing in the legislative history of § 176a is of aid in determining the intended scope of the word 'knowing," as it is used in that section. In making that determination, we have employed as a general guide the definition of 'knowledge' which appears in the Proposed Official Draft of the Model Penal Code, at 27 (1962). The Code provides:
>
> > 'When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.'

395 U.S. at 46 n.93. The provision referred to by the Court became § 2.02(7) of the Official Draft of the Model Penal Code (ALI 1985). Reference to the 1962 draft of the Code, which had been under active and public consideration since the mid-1950s, was no doubt useful and appropriate in ascertaining the intent of Congress as expressed in 1956 legislation, such as former § 176a.

The same is true of Turner v. United States, 396 U.S. 398, 416 & n.29 (1970), which reiterated and applied the Leary language to uphold a similar presumption, in

former 21 U.S.C. § 174, enacted at the same time as § 176a, of knowledge of the imported status of heroin.[10] Turner concluded that those who deal in heroin must "inevitably become aware" that the substance has been imported, "unless they practice a studied ignorance to which they are not entitled." Id. at 417.

In a thorough review of the literature and caselaw on deliberate ignorance, a student Note in the Yale Law Journal concluded a few years ago that there is "confusion and conflict" among the circuits on several key issues. Note (J. Marcus), *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 Yale L.J. 2231, 2232 (1993) (hereinafter cited as "Yale Note"). Among these is a fundamental inconsistency in the circuits concerning the question whether the "willful blindness" construct describes a special exception reserved for rare cases or a common and general aspect of the definition of knowledge. See Yale Note, at 2232-33.

The Second Circuit, like the court below, has adhered to the view that a willful blindness instruction is "commonly used" in cases requiring proof of knowledge, and properly so. United States v. Rodriguez, 983 F.3d 455, 457 (2d Cir. 1993) (Newman, J.) (quoting United States v. Fletcher, 928 F.2d 495, 502 (2d Cir.), cert. denied, 502 U.S. 815 (1991)). While adoption of the Model Penal Code definition of knowledge, which includes "high probability" language without the addi-

[10] This Court again relied on the Model Penal Code formulation, awareness of a high probability, in the course of testing the constitutionality of the common law presumption of knowledge that property is stolen from unexplained possession soon after the theft. Barnes v. United States, 412 U.S. 837, 845 (1973).

tional "deliberate ignorance" component that all the federal courts have required, would certainly render the use of the instruction "common,"[11] the Second Circuit's view cannot be squared with the principles and issues outlined by Justice Kennedy as author of the influential dissent in United States v. Jewell, 532 F.2d 697 (9th Cir.), cert. denied, 426 U.S. 951 (1976).

In Jewell, the Ninth Circuit split 9 to 4 over whether a jury instruction that omitted the "high probability" language amounted to "plain error." Writing for the four dissenters, then-Judge Kennedy pointedly elaborated the dangers to defendants' rights from over-use of this doctrine. 532 F.2d at 705-08.[12] See generally Robin

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[11] The circuits are divided on the question whether a proper conscious avoidance instruction must include the Model Penal Code's "high probability" language. The Second, Third, and Ninth Circuits, at least, require inclusion of this language. See, e.g., United States v. One 1973 Rolls Royce, 43 F.3d 794, 807-08 & 809 n.13 (3d Cir. 1994) (Becker, J.) (discussing cases including United States v. Murrieta-Bejarano, 552 F.2d 1323, 1324 (9th Cir. 1977)). The Fifth, Eighth and Tenth Circuits, in contrast, reject it, according to the Yale Note. 102 Yale L.J. at 2243-53. The "otherwise would have been obvious" formulation often used in the latter group of circuits, in lieu of the "high probability" language, is not equivalent; the former states an objective test, based on a hypothetical circumstance, while the latter requires actual, subjective awareness. This split has persisted for over a decade and is deeply ingrained. The trial court here did charge the jury that the defendant must, to be guilty, have been aware of a high probability of the fact to which he shut his eyes.

[12] Even the majority in Jewell strongly suggested that the instruction given there was erroneous, albeit not plain error in all the circumstances, and as mentioned in note 11 ante, the

Charlow, *Wilful Ignorance*, 70 Tex.L. Rev. 1351 (1992); Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J.Crim.L. & Crimin. 191 (1990).

The only other pertinent decision of this Court appears to be Spurr v. United States, 174 U.S. 728, 735 (1899). In Spurr, the Court reversed the conviction of a bank officer for "willfully" making a false certification of a customer's check, knowing there were insufficient funds on account to back the check (under a predecessor of the current 18 U.S.C. § 1004), because the trial court, in a supplementary instruction responding to a request from the jury for clarification of the statute involved, failed (despite a defense objection) to include the "willfulness" element when re-reading the statute. In the course of explaining that the "wrongful intent is the essence of the crime," 174 U.S. at 735, the Court's opinion stated that the required specific intent could be found:

> if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of that fact.

Id. The Spurr decision thus endorsed "purpose[ful] ... ignorance" as a means of proving the willfulness element ("evil design") in that statute.[13] The ruling in Spurr does

_____(cont'd)

Ninth Circuit has since squarely held that the Model Penal Code language is required.

[13] The other means is "gross indifference to duty." In this case, unlike Spurr, petitioner violated no fiduciary or legally imposed "duty" to the DEA or to anyone else in respect to his sales of pseudoephedrine, nor did the trial court here instruct

not hold that deliberate ignorance is a general substitute for a statutory element of "knowledge."

In this case, no willful blindness instruction should have been given at all. When Congress employed the term "reasonable cause to believe," it was adopting a nontraditional mental state carrying no common-law pedigree, but with a history of usage and interpretation in dozens of other federal criminal statutes in this century.[14]

_____(cont'd)

on a "gross indifference to duty" theory. Any consideration of the validity of that doctrine may therefore be safely set aside. It should be noted that some thoughtful readers of Spurr have suggested that its holding applies only to cases involving a breach of positive duty. E.g., United States v. Jewell, 532 F.2d 697, 706 & n.9 (9th Cir.) (in banc) (Kennedy, J., dissenting, joined by three others), cert. denied, 426 U.S. 951 (1976); Yale Note, at 2234. On the other hand, in the criminal enforcement of regulatory and other malum prohibitum laws, actual knowledge of the critical facts (though not of the terms of a regulation or other law necessarily) is often particularly important in order to ensure some component of moral culpability. See, e.g., Staples v. United States, 511 U.S. 600 (1994); United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971); United States v. Freed, 401 U.S. 601 (1971); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952). The willful blindness doctrine is at least as problematic in those cases.

[14] See, e.g., 18 U.S.C. §§ 542 (customs); 842(a)(3)(B), 842(h), 842(o) (explosives); 922(a)(4), 922(b)(1),(2),(3), 922(d), 922(f)(1), 922(i), 922(j), 922(q)(2), 922(x)(1), 924(b) (firearms); 964(a), 966(a), 967(a) (Neutrality Act); 21 U.S.C. §§ 843(a)(6),(7), 960(d)(3),(4) (drugs). This incomplete catalog covers only Titles 18 and 21 and omits statutes with substantially similar formulations, such as "reasonable cause to know."

That standard is inherently neither stricter nor more lenient than "willful blindness"; it is just different.

On the one hand, nothing in the "reasonable cause" formulation expressly requires a conscious purpose to avoid learning the truth, as does "deliberate ignorance." Similarly, a defendant cannot be guilty on a "willful blindness" theory if s/he "actually believes" the fact is not true, regardless of reasonableness. In that sense, "reasonable cause to believe" may be less favorable to a defendant than a "willful blindness" test.

On the other hand, a defendant should not be convicted under the "reasonable cause" rule without actually having been exposed to a compelling accumulation of clues to the true situation. "Willful blindness," on the other hand, may involve true ignorance, albeit contrived. Thus, in another sense, the "reasonable cause" standard may, in a particular case, prove more favorable to the defendant.

This Court, in approving the use of a deliberate ignorance charge in Turner and Leary, relied on the Model Penal Code formulation of "knowledge,"[15] but the American Law Institute, in that Model Code, does not allow willful blindness to substitute for "knowledge" of a

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[15] To be more precise, however, the Model Penal Code does not actually use either the phrase "willful blindness" or "deliberate ignorance"; instead, it simply permits, under certain circumstances, the defendant's "aware[ness] of a high probability" that a fact is true to satisfy an element requiring "knowledge." See generally Yale Note, at 2237-39. The circuits, disregarding this Court's lead in Leary and Turner, have not adopted or endorsed the ALI's approach, much less its formula, favoring instead a "willful blindness" alternative. Id. at 2241-52.

future fact, as it would be used in § 841(d)(2). The ALI carefully noted in the Official Commentary to this subsection that, "The Code proposes that the case [of conscious avoidance] be viewed as one of acting knowingly when what is involved is a matter of existing fact, but not when what is involved is the result of the defendant's conduct, necessarily a matter of the future at the time of acting." 1 ALI, *Model Penal Code and Commentaries (Official Draft)*, pt. I, § 2.02(7), comment. ¶9, at 248 (1985).[16] The scholarly drafters of the Model Penal Code recognized the problem in understanding the concept of "knowledge" as applied to a future fact as exacerbated in a "willful blindness" case and made their modernization of that doctrine inapplicable to statutes requiring knowledge of what will occur, rather than what has occurred or is occurring. The decision below entirely disregards this problem with its holding.

As the Note concludes, this Court "has allowed the problem of what constitutes knowledge to fester for over twenty years since it approved use of Section 2.02(7) in [Leary and Turner]. The Court should take the earliest opportunity to resolve this issue by granting certiorari in an appropriate case." Yale Note, at 2257.

As the experience of the jury in petitioner's case amply reveals, as shown by the length of deliberations and a request for supplemental instructions on this score, attempting to apply the "willful blindness" and "reason-

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[16] Instead, as discussed in the following point of this petition, where knowledge of a future fact is at issue the Model Penal Code allows that standard to be satisfied with actual knowledge that the fact is "practically certain" to be true. See note 18 post; see generally Robbins, *The Ostrich Instruction*, supra, 81 J.Crim.L. & Crimin. at 214-20.

able cause to believe" standards simultaneously is geometrically more confusing than either of them alone.[17] The only proper question is which construction seems the more faithful interpretation of the language used by Congress. See Leary, 395 U.S. at 46 n.93. The better reading of 21 U.S.C. § 841(d)(2) is that the "willful blindness" alternative to "knowledge" should play no part in trials under that provision. The writ should be granted so that the Court can address the "willful blindness" doctrine, a poorly understood but important area of federal criminal law.

2. The decision below departs from this Court's cases by construing a federal criminal statute in a manner which fails to honor its plain language, and which risks criminalizing the lawful conduct of a regulated business.

The court below, in a published opinion, construed the provisions of 21 U.S.C. § 841(d) against its plain language, and in a manner dangerous to legitimate over-the-counter pharmaceutical firms, while disregarding this Court's cases guiding the construction of criminal statutes. Certiorari should be granted to resolve this inconsistency in the application of a criminal provisions of the Controlled Substances Act.

The opinion of the court of appeals concedes that insufficient evidence was presented at trial to show that "any of the pseudoephedrine [petitioner] distributed was *actually* used to manufacture methamphetamine ...." Appx. A5 (emphasis original). The court nevertheless

[17] The panel, without further explanation, says it found "no merit" to Mr. Prather's argument in this regard. Appx. A9.

declared this deficiency immaterial, concluding from "the plain language of the statute," id., that the defendant need "only" have "knowledge" at the time of the distribution that the recipient has "the present intent to" manufacture. Id.

The penal provision in question provides, in pertinent part:

> Any person who knowingly or intentionally -- ...
>
> (2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; ...
>
> shall be fined ... or imprisoned not more than 10 years ..., or both.

As the opinion acknowledges, "Section 841(d)(2) criminalizes the distribution of a listed chemical with knowledge that the chemical *will be* used to manufacture a controlled substance." Id. (first emphasis added). Because the statute's words describe a definite fact, albeit a future one (how the chemical "will be used"), while the opinion below reads the statute as describing a current state of mind (the recipient's present intention to use the chemical in manufacturing), the opinion's construction of this complex law does not conform to the language used by Congress to define this crime.

Petitioner does not dispute that the time when the crime occurs is the time of distribution of the chemical by the accused. "[T]he words themselves tell us that the controlled substance in question will not have been manufactured at the moment when the crime is

complete." Appx. A5-6. The paradox of this statute's language, then, is that to be guilty the defendant must know, at the time of his act of distribution, how the chemical "will be" used, often by someone else, at a later time. The words "will be" plainly refer to a future occurrence. The statutory language thus poses the philosophical (or more precisely, epistemological) mystery of what it means to have knowledge of a fact that has not yet occurred, without distorting the meaning of that term to the equivalent of mere belief or expectation.[18] Congress did not write the statute using words that penalize those who distribute listed chemicals with knowledge that their customers "intend to" misuse them in drug manufacturing, as the circuit court's analysis would have it. That would be a simpler statute to under-

[18] The court of appeals decision does not appear to dispute petitioner's understanding of what is meant by the word "knowledge." As petitioner argued below, "Knowledge is a state of mind in which strong belief is coupled with the believed fact being actually true. See, e.g., Morissette v. United States, 342 U.S. 246, 259 (1952); United States v. Golomb, 811 F.2d 787 (2d Cir. 1987)." Aplt.Br. 31. Under the Model Penal Code, knowledge can also be proven, in cases where "the element involves the result of his conduct," if the defendant "is aware that it is practically certain that his conduct will cause such a result." Amer. Law Inst., *Model Penal Code: Official Draft and Explanatory Notes* § 2.02(2)(b)-(ii) (1985). It may be that as to the future fact of how the chemical "will be" used, Congress intended to permit conviction upon proof of the defendant's actual knowledge of what is "practically certain" to occur. No such instruction was given to this jury, however, nor has the government ever so argued. Thus, petitioner's conviction could not be upheld on that alternative basis.

stand, and would perhaps make it easier for the government to obtain convictions (by allowing the present intent of the customer to be inferred from circumstantial evidence alone). But it is not section 841(d)(2), as drafted and enacted by Congress.

Instead, while the offense is committed at the time of distribution or possession, the later use of the chemical is a critical fact. Nor is there anything anomalous about the idea that a statute might forbid certain conduct subject to a then-future contingency, which ripens into a prosecutable offense only if that future event later occurs -- as a murder charge cannot be brought unless (and not until after) the victim dies, even though that may be long after the fatal blow is struck. The court below followed the holding of a Seventh Circuit case that is utterly unpersuasive. Appx. A6. The decision in United States v. Green, 779 F.2d 1313 (7th Cir. 1985), contains no legal analysis, but instead brands the appellant's straightforward, plain language argument a "novel theory of law" that requires further support. 779 F.2d at 1319. The Green case thus rests upon a transparently erroneous assumption -- that the meaning of the statute must be found in case law or legislative history rather than in language and logic.

The decision below, like the Seventh Circuit case it endorses, completely fails to explain why the statute could not be applied as it reads: retrospectively as of the time of indictment, allowing prosecution in those cases where the uncertainty with respect to future events that existed inherently at the time of the charged conduct has later proved to be reality. Under this reading, which is the only one consistent with the statutory language, the time of the charged conduct remains the time of the

defendant's act of distribution; evidence needed to prove the necessary "knowledge," however, may not exist until some time later.

The other cases cited in the opinion (Appx. A6-7) all involve a special scenario not presented by the instant case -- an arrest which occurs during the commission of the act of distribution (or possession). See United States v. Benbrook, 40 F.3d 88, 94 (5th Cir. 1994); United States v. Washington, 858 F.2d 590 (10th Cir. 1988). Petitioner has not disputed that where the natural course of events put in motion by the defendant is interrupted by law enforcement activity, the defendant cannot go free by arguing that the offense had not been completed.[19] It may not be unreasonable to construe § 841(d)(2) as barring possession and distribution of precursors, "knowing ... that it will be used to manufacture a controlled substance" unless law enforcement authorities intervene first.[20] The instant case is not within that

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[19] The Eleventh Circuit's earlier decision in United States v. Hyde, 977 F.2d 1436 (11th Cir. 1992), cert. denied, 507 U.S. 1052 (1993), also arose out of such a case. In any event, as the panel implicitly acknowledges (Appx. A7), Hyde merely noted that § 841(d)(2)'s language assumes the manufacturing will not yet have taken place at the time of the commission of the actus reus (possession or distribution). Petitioner's position is not to the contrary. We argue only that the defendant cannot be shown to have the required mens rea of "knowing" what "will be" done later unless it is shown at trial that the "known" future fact later came to pass (or perhaps, as discussed in text above, that it failed to come about as a result of law enforcement intervention).

[20] Even then, the Court might well choose to import the Model Penal Code limitation requiring proof of what was otherwise "practically certain" to occur. See note 9 ante.

proviso, however. The question here is what the statute requires to be shown when events have taken their normal course, and an arrest occurs years later.

"Will be" does not mean "would be," and it does not mean "is intended to be." "Knowing" does not mean "believing," and it does not mean "intending." Petitioner Prather's arguments on the "will be used to manufacture" clause of § 841(d)(2) simply assumes that Congress meant to use the words it chose according to what they mean, including the tense and definiteness of the verbs. This is a grammatical, plain language argument. The decision below does not confront either the significance of the word "knowing" or of the formulation "will be."

The question presented as to the meaning of this statute has a highly practical significance. Section 841(d)(2) wields severe criminal penalties to regulate a segment of the legal, over-the-counter pharmaceutical business. Millions of pseudoephedrine tablets are sold in this country in drug stores, five-and-tens, and minimarts. This statute should be construed not with the drug dealer in mind, but with consideration for the legitimate business person. Petitioner himself operated openly, advertising and selling a legal product in bulk, not violating any FDA or DEA regulations, and keeping complete records. Yet a jury determination of his knowledge and intent led to his conviction and sentence. Affirmance was based on the court of appeals' analysis of his customers' intent. Statutes mean what they say, and must not be misread simply because doing so might aid in the government's attack on a larger social problem. This is particularly so of criminal statutes that attack a lawful activity as an indirect weapon in another war. See Ratzlaf v. United States, 510 U.S. 135 (1994).

The "will be" language in 21 U.S.C. § 841(d)(2) must not be disregarded or rendered meaningless. "In construing a statute we are obliged to give effect, if possible, to every word Congress used." Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); accord, Ratzlaf, 510 U.S. at 140-41. Here, enforcing that language has the effect of protecting those who choose to deal in legal but abusable substances like listed chemicals to just the limited extent a reasonable and fairminded legislature seeking to control the drug trade might wish.

Imagine someone who takes the risk of selling pseudoephedrine to the kinds of customers the jury found petitioner did, and under all the circumstances shown by the evidence, subjectively believing that those customers intend to make methamphetamine. But suppose that in fact he is wrong: suppose the guy he met in the bar does later resell it to hospitals, and the "head shop" does in fact act as a jobber for discount pharmacies. A reasonable Congress might believe that the seller then ought not be convicted of a federal crime, even though if he had been right in his prediction of his customers' misconduct he would deserve punishment. That reasonable possibility describes at least the actual knowledge clause of § 841(d)(2) as written -- as the defense asked that it be applied in this case, but which the trial court and the court of appeals refused.

The foregoing discussion focuses on the first of the two ways that 21 U.S.C. § 841(d)(2) defines this crime (actual knowledge), but it is equally -- if not more -- applicable to the second (reasonable cause to believe). The statutory phrase "having reasonable cause to believe that the listed chemical will be used to manufacture a controlled substance," unlike the phrase "knowing ... that

the listed chemical will be used," is at least ambiguous; because it focuses on belief rather than on knowledge, it could grammatically be read as not requiring that the future fact (misuse of the chemical) turn out to be true, but only that the defendant had a sound basis to anticipate that it would. For several reasons, that reading of the "reasonable cause" prong of this statute should be rejected as well.

First, a statutory construction should be avoided that assigns the same words, "will be," two different meanings in their two applications within the same sentence. Ratzlaf, 510 U.S. at 143. Second, statutory construction should be avoided that raises a substantial constitutional question. See Jones v. United States, 526 U.S. 227 (1999). This prong of the statute results in felony punishment only of someone who did not actually know how the chemicals would be used (the person with actual knowledge is convictable under the first clause). Here, to read the "reasonable cause" clause so as not to require that any misuse of the distributed chemicals ever have actually occurred would result in a felony lacking in any culpable *mens rea* and any actual social harm, just the possibility of a risk of harm. This Court has never approved such a construction of a serious federal statute; it is questionable whether Due Process would allow it. See United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); Staples v. United States, 511 U.S. 600 (1994).

Moreover, a construction under which "will be" is read as "might be," or "is expected to be," or even as meaningless would render the statute unconstitutionally vague, by giving it an unanticipated meaning, and by inviting arbitrary and unrestrained law enforcement discretion, particularly under the "reasonable cause"

prong. See City of Chicago v. Morales, 527 U.S. 41 (1999). Finally, the rule of lenity requires that a genuinely ambiguous statute be given the more limited, less punitive reading. Ratzlaf, 510 U.S. at 148-49; see, e.g., Williams v. United States, 458 U.S. 279, 286 (1982) ("when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable 'understandings'").

A proper reading of 21 U.S.C. § 841(d)(2) shows the jury instructions to be erroneous and the evidence to be insufficient. For these reasons, the Court should grant the instant petition for a writ of certiorari on this issue.

3. By omitting the requirement of a showing of "bad faith" and allowing "reasonable cause to believe" to be equated with negligence, the opinion of the court below conflicts with this Court's decisions under other statutes construing the meaning of the same mental state.

The jury instructions on "reasonable cause to believe" departed from this Court's precedent in two ways. First, the trial court erred in reducing the standard for conviction to one of mere negligence. Second, the trial court committed plain error in omitting the subjective scienter element which is called "bad faith" in all the case law construing similar statutes.

The trial court took special verdicts from the jury on Counts Two through Thirteen, focused on the difference between acting knowingly and acting with "reasonable cause to believe" that the pseudoephedrine sold by XLI "would be used" to manufacture methamphetamine. The jury returned a verdict based on "reasonable cause"

only on Count Seven. The instructions on that theory were as defective as those on actual knowledge, discussed under Points 1 and 2 of this petition.

This Court has read into statutes like § 841(d)(2), where a seemingly objective standard of "reasonable cause to believe" (or "to know" in some cases) is used in lieu of any traditional mens rea, a subjective element of acting in "bad faith." Thus, in Gorin v. United States, 312 U.S. 19 (1941), construing what is now 18 U.S.C. § 793, the espionage act, the Court held:

> The obvious delimiting words in the statute are those requiring 'intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.' This requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established.

312 U.S. at 27-28. Unless "bad faith" is read into it, § 841(d)(2) seems to impose a purely objective test for mental state, contrary to the authoritative reading of the same language in Gorin. By omitting any subjective element of mens rea, either intent or at least "bad faith," the district court committed plain error in its instructions on "reasonable cause to believe."

Instead of charging on "bad faith," Judge Forrester explained the "reasonable cause to believe" standard as follows:

> [T]he government must show that ... the facts known to the defendant ... would cause a reasonable person ... to reasonably conclude that the pseudoephedrine was being diverted to the illegal manufacture of a controlled substance.

> You will notice the difference. The question under this standard is no longer what did the defendant know or believe. But instead the question is what would a reasonable person reasonably have believed based on the evidence known to the defendant.

Entirely omitted was any reference to the subjective "bad faith" requirement, implying either that the test was purely objective or that negligence would suffice.[21]

The defense did not request an instruction on "bad faith" or object to its absence, but the error is plain. Fed.R.Crim.P. 52(b). See Johnson v. United States, 520 U.S. 461 (1997); Pipefitters Local 562 v. United States, 407 U.S. 385, 440-42 & n.52 (1972). The key contested element of the offense -- the mental state -- was fundamentally misdescribed. The court of appeals found no plain error because petitioner was found guilty of having actual knowledge on nine other counts. Appx. A11. The error was nonetheless plain on Count Seven.

The omission of any subjective component from the charge on "reasonable cause to believe" was not the only reversible error in that instruction. The initial charge on "reasonable cause" was unclear on how close that standard was to negligence. The supplemental instruction delivered in response to the jury's request for aid after a day's deliberations was unambiguous, however. At that critical point, the court charged:

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[21] In addition, this instruction inserted, incorrectly, an "or believe" reference into the actual knowledge prong. It also wrongly changed the statute's "will be used to manufacture" in-the-future focus to a time-of-the-offense "was being diverted." Either of these could itself be called plain error.

> Now ... reasonable cause to believe. ... [W]hat it's getting at is requiring people to exercise reasonable or ordinary care in the conduct of a business involving listed chemicals. ...

Defense counsel objected to this on the basis that a standard of "ordinary care" reduced the "reasonable cause" prong to a mere negligence test.[22] The district court agreed, saying: "I don't think it can be truthfully understood any other way."[23] A person's failure to "exercise reasonable or ordinary care" is the essence of negligence. Particularly because this instruction came at the end, in response to a jury question, there is no avoiding the conclusion that the error required reversal.

As the trial court acknowledged, its construction of the statute raises a constitutional question whether a ten-year felony can be based on ordinary negligence: "The appellate court might very well decide that that exceeds the power of the Congress, and I might readily agree with them." The lower court apparently failed to see that this very concern provides a compelling reason not to inter-

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[22] The court below wrongly asserts that defense counsel failed to object on this ground in the district court, and therefore does not address the issue other than as "plain error." Appx. A10-11.

[23] The danger that the jury would accept mere negligence as the test for "reasonable cause to believe" was exacerbated by the contrast with the instruction on knowledge and willful blindness, which included the lines, "I emphasize to you, however, that actual or positive knowledge or belief on the part of the defendant cannot be established by a mere showing that the defendant was negligent, careless, or foolish." No such caution was attached to the "reasonable cause" instruction.

pret the statute as it did. Almendarez-Torres v. United States, 523 U.S. 224, 237-38 (1998) (discussing doctrine of "constitutional doubt"); see United States v. Richardson, 526 U.S. 813, 820 (1999); Jones v. United States, 526 U.S. 227 (1999). For this reason, and under the cases from Gorin onward, the statute must not be so construed.

The lower court did not "clear ... away with concrete accuracy" whatever confusion the jury may have had from the original instructions on the statute's dual *mens rea* element. See Bollenbach v. United States, 326 U.S. 607, 613 (1946). Accordingly, the trial court abused its discretion in failing to aid the jury in resolving its difficulty on this subject.

Both because the court committed reversible error in equating the statutory "reasonable cause" test with ordinary negligence, and because of the plain error in omitting the subjective mental element of "bad faith," the Count Seven conviction, based on "reasonable cause to believe," should have been reversed. The writ should be granted on this issue as well.

CONCLUSION

For the foregoing reasons, petitioner VERNON VICTOR PRATHER, JR., prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit affirming his conviction.

Respectfully submitted,

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July 27, 2000.

APPENDIX A

205 F.3d 1265

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-9094

D.C. Docket No. 97-00171-1-CR-2-JOE

UNITED STATES of America,

Plaintiff-Appellee,

versus

Vernon Victor PRATHER, Jr., a.k.a. "Billy",

Defendant-Appellant.

(March 7, 2000)

*1267 Peter Goldberger, Ardmore, PA, for Defendant-Appellant.

Catherine M. O'Neil, Atlanta, GA, for Plaintiff-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

Before CARNES, BARKETT and MARCUS, Circuit Judges.

BARKETT, Circuit Judge:

Vernon Victor Prather appeals his conviction for conspiracy to distribute pseudoephedrine in violation of 21 U.S.C. §§ 861(d)(2) and 846, distribution of pseudo-

ephedrine in violation of 21 U.S.C. § 841(d)(2) and 18 U.S.C. § 2, and money laundering in violation of 18 U.S.C. §§ 2 and 1957(a). Prather asks this Court to discharge him, vacating his conviction and sentence or, alternatively, to grant him a new trial. We affirm Prather's conviction and sentence, with the exception of the imposition of the special assessment.

*1268 BACKGROUND

Prather was president and sole stockholder of X-Pressive Looks, Inc. ("XLI"), a Florida-based mail-order corporation with offices in Florida, Georgia, and California. XLI distributed miscellaneous items, including over-the-counter pharmaceuticals. During 1994 and 1995, approximately 80% of XLI's business was derived from the distribution of pseudoephedrine, which is commonly marketed as a nasal decongestant. Pseudoephedrine is also a "listed chemical" under 21 U.S.C. §§ 802(33) and 802(34), and 21 C.F.R. § 1310.02(a)(11), because it can be used as an ingredient to manufacture methamphetamine, a controlled substance. XLI generally distributed pseudoephedrine in cases containing 75 bottles, each containing 1,000 tablets. Between April 1994 and August 1995, XLI distributed more than 830 million tablets of pseudoephedrine to 173 wholesale customers, including several "head shops" and numerous individuals. The vast majority of those customers lacked business licenses, and many had the pseudoephedrine shipped directly to their home addresses.

At trial, the government presented evidence that, beginning in September 1994, Prather knew from numerous sources that his product was being diverted from the legitimate market for the illegal manufacture of

methamphetamine. In addition to other evidence, the jury heard testimony from Alberto Saa that in late 1994 or early 1995, he contacted Prather at XLI about purchasing 100 cases of pseudoephedrine per week, to be shipped to his home address. He testified that Prather informed him that such an arrangement "wasn't a good idea" because the "cops would be hot on" both Prather and Saa, and instructed Saa to buy from one of XLI's "head shop" customers instead.

The government also presented testimony that Prather specifically knew that in 1994 and 1995, several of his customers were investigated by law enforcement agencies and had pseudoephedrine shipments seized by authorities. Prather continued to sell shipments to these customers after the seizure. In May 1995, Prather obtained from a law firm an opinion letter advising Prather that selling millions of pseudoephedrine tablets to small outlets might be considered prima facie evidence of an intent to violate the law. On May 31, 1995, the DEA executed search warrants at XLI's Atlanta offices, seizing, among other items, more than 500 cases of pseudoephedrine. After the search, XLI significantly raised the price of its pseudoephedrine, and its customers continued to buy hundreds of cases. Finally, Prather's sales manager Daniel Matta, who was also indicted, pled guilty to the charges against him and testified against Prather at Prather's trial.

Prather was ultimately convicted of: 1) one count of violating 21 U.S.C. § 846 by conspiring to distribute pseudoephedrine, a listed chemical, knowing or having reasonable cause to believe that the chemical would be used to manufacture a controlled substance; 2) ten counts of violating 21 U.S.C. § 841(d)(2) by actually

distributing pseudoephedrine, knowing or having reasonable cause to believe that it would be used to manufacture a controlled substance; and 3) five counts of violating 18 U.S.C. §§ 2 and 1957 by engaging in monetary transactions in criminally derived property in excess of $10,000. He was sentenced to a 14 year term of incarceration, followed by 3 years of supervised release. He was ordered to pay a fine of $175,000 and a special assessment of $100 for each of the sixteen counts on which he was convicted. Prather appeals his conviction and the imposition of the special assessment.

DISCUSSION

Prather's convictions for conspiracy and money laundering are predicated on his convictions under 18 U.S.C. § 241(d)(2) for distributing pseudoephedrine knowing or having reasonable cause to believe that the pseudoephedrine would be used to manufacture *1269 methamphetamine. Section 841(d) provides that:

> Any person who knowingly or intentionally -- ... (2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance ... shall be fined ... or imprisoned.

Prather challenges his conviction and sentence on several grounds. First, he contends that the government failed to prove that the listed chemicals he sold were actually used to manufacture a controlled substance, which he claims constitutes an element of the crime. Second, he contends that the district court judge's jury instructions were so erroneous as to justify overturning his conviction or granting a new trial. Third, he argues

that the judge's refusal to allow the defense to play a previously recorded tape of a government witness during cross-examination violated the Confrontation Clause and the Federal Rules of Evidence. Finally, Prather argues that the trial judge violated the Federal Sentencing Guidelines and the Ex Post Facto Clause by imposing the special assessment as he did. We address each argument in turn.

I. *Sufficiency of the Evidence to Prove a Violation of the Statute*

The basis of Prather's argument that the evidence presented against him was insufficient to support a conviction is his contention that he cannot be convicted under Section 841(d)(2) until a controlled substance has been produced. Because the government failed to prove that any of the pseudoephedrine he distributed was *actually* used to manufacture methamphetamine, Prather contends that he should not have been convicted on the substantive distribution counts, and therefore on the conspiracy and money laundering counts.

In interpreting the meaning of a statute, it is axiomatic that a court must begin with the plain language of the statute. On its face, Section 841(d)(2) criminalizes the distribution of a listed chemical with knowledge that the chemical *will be* used to manufacture a controlled substance. The plain language of the statute requires only knowledge of the present intent to violate the law, not the actual accomplishment of the act. The plain meaning of these words indicates that, in enacting this statute, Congress did not intend to require proof that the controlled substance had actually been manufactured. Rather, the words themselves tell us that the controlled

substance in question will not have been manufactured at the moment when the crime is complete. We have found no authority that supports any other reading of the plain language of Section 841(d)(2).

We note that all of our sister courts that have considered the issue have likewise construed Section 841(d)(2). In *United States v. Green*, the Seventh Circuit explicitly rejected, as we do here, a contention identical to Prather's, finding that it was unsupported by either the language of the statute, the statute's legislative history, or any caselaw. *See* 779 F.2d 1313, 1319 (7th Cir. 1985). That court instead found that "the plain language of the statute reveals that Congress intended to impose a broad prohibition against the manufacture of [methamphetamine] as well as the possession of [pseudoephedrine] when knowing or having reasonable cause to believe the [pseudoephedrine] would be used to manufacture [methamphetamine]." *Id.* The Fifth and Tenth Circuits have similarly upheld convictions under Section 841(d)(2) where the government has not proved that a controlled substance was actually manufactured from the listed chemical in question. *See United States v. Benbrook*, 40 F.3d 88, 94 (5th Cir. 1994) (holding that Section 841(d)(2) "does not require the possessor [of a listed chemical] to be either in the process of manufacturing the drug or presently able to do so to be guilty"); *United States v. Washington*, 858 F.2d 590, 594 (10th Cir. 1988) (upholding a conviction based on the government's "theory that the [listed chemical] ... eventually *1270 would be used to arrive at [a controlled substance]").

Additional support for this reading of Section 841(d)(2) is provided by precedent from our own Circuit. In *United States v. Hyde*, a panel of this Court held that

"[v]iolation of section 841(d)(2) presumes that the final product, the controlled substance, has not yet been manufactured." 977 F.2d 1436, 1439 (11th Cir. 1992). Although this language may not precisely answer the question before us, it leans decidedly in the direction of answering that question in the negative. The panel explained that "[t]o violate section 841(d)(2), possession of a precursor chemical must be coupled with the knowledge that it would be manufactured into a controlled substance." *Id.* There is no mention of the need to prove that it was in fact so converted. We conclude that Section 841(d)(2) does not require proof that a listed chemical was actually used to manufacture a controlled substance.

II. *Jury Instructions*

We review the legal correctness of a jury instruction de novo, *see United States v. Tokars*, 95 F.3d 1520, 1531 (11th Cir. 1996), but defer on questions of phrasing absent an abuse of discretion, *see United States v. Starke*, 62 F.3d 1374, 1380 (11th Cir. 1995). Generally, district courts "have broad discretion in formulating jury instructions provided that the charge as a whole accurately reflects the law and the facts," and we will not reverse a conviction on the basis of a jury charge unless "the issues of law were presented inaccurately, or the charge improperly guided the jury in such a substantial way as to violate due process." *United States v. Arias*, 984 F.2d 1139, 1143 (11th Cir. 1993) (internal quotation marks omitted). Where a party did not object to a jury instruction in the district court, we review that instruction for plain error. Fed.R.Crim.P. 30, 52(b).

Section 841(d)(2) criminalizes the distribution of a listed chemical when the distributor knows *or* has "reasonable cause to believe" that the chemical will be used to manufacture a controlled substance. In order to find that Prather was guilty under any of the twelve counts charging him with violating the statute, the jury thus needed to find *either* that he knew the pseudoephedrine would be used to manufacture methamphetamine or that he had reasonable cause to believe that it would be. Accordingly, the trial judge instructed the jury on both knowledge and "reasonable cause to believe." Prather challenges both sets of instructions. When the jury returned its verdict, it specified in a special verdict that it found Prather guilty under nine counts because he knew that the pseudoephedrine would be used to manufacture a controlled substance, and under one count because he had reasonable cause to believe that it would be.

A. *Instructions Regarding Actual Knowledge*

Under both the statute and binding precedent in this Circuit, the knowledge element of a violation of a criminal statute can be proved by demonstrating either actual knowledge or deliberate ignorance. "This Court has consistently recognized deliberate ignorance of criminal activity as the equivalent of knowledge." *Arias*, 984 F.2d at 1143 (internal quotation marks omitted). "The deliberate ignorance instruction is based on the alternative to the actual knowledge requirement at common law that if a party has his suspicions aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge." *United States v. Rivera*, 944 F.2d

1563, 1570 (11th Cir. 1991) (internal quotation marks omitted). Although we recognize that the delivery of such an instruction is proper "only in those comparatively rare cases where ... there are facts that point in the direction of deliberate ignorance," *id.*, we are satisfied that there was sufficient evidence in this case to warrant an instruction on deliberate ignorance. We find no merit to Prather's suggestion that Congress intended to preclude an instruction on deliberate ignorance by adding "having *1271 reasonable cause to believe" as an alternative element of guilt.[1]

B. *Jury Instruction Regarding Reasonable Cause to Believe*

The jury convicted Prather on Count Seven on the basis of its conclusion that, as to this count, he had "reasonable cause to believe" that the pseudoephedrine was going to be used for illegal purposes. Prather argues that his conviction on this count must be reversed because the jury instructions explaining "reasonable cause to believe" were erroneous. Specifically, he argues that the trial court should have instructed the jury that, in order to find him guilty on this basis, they must also find that he acted in bad faith.

In its initial instruction to the jury on "reasonable cause to believe," the trial judge stated that:

> [T]he government must show that based on the facts known to the defendant -- although

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[1] We reject Prather's argument that the ad hoc examples used by the trial judge to illustrate his instructions on actual knowledge and deliberate ignorance constituted reversible error in this case.

> not showing actual knowledge of the defendant -- based on these facts, these facts would cause a reasonable person knowing those facts to reasonably conclude that the pseudoephedrine was being diverted to the illegal manufacture of a controlled substance.... [T]he question is what would a reasonable person reasonably have believed based on the evidence known to the defendant.

After deliberating for some time, the jury requested further instructions to clarify the standards. In those instructions, the judge attempted to explicate further the "reasonable cause to believe" standard by explaining:

> [W]hat it seems to me that it's getting at is requiring people to exercise reasonable or ordinary care in the conduct of a business involving listed chemicals. Here the focus is not on what it is proven that he actually knew. Here the standard is[,] based on what he did know, would a reasonable person, an abstract reasonable person have cause to believe that the pseudoephedrine in the count would be diverted.

Prather urges this Court to find both that the initial instruction was faulty because it failed to include a bad faith requirement, and that the supplemental instruction compounded this error by reducing the "reasonable cause to believe" standard to a negligence standard.

Because Prather failed to object to this instruction at trial, we review for plain error. *See Starke*, 62 F.3d at 1380-81. A reversal based on plain error requires that the challenged instruction be a plainly incorrect statement of the law and:

> that it was probably responsible for an incorrect verdict, leading to substantial injustice .... If the instruction will mislead the jury or leave the jury to speculate as to an essential point of law, the error is sufficiently fundamental to warrant a new trial despite a party's failure to state a proper objection.

Montgomery v. Noga, 168 F.3d 1282, 1294 (11th Cir. 1999) (internal quotation marks and citation omitted). Under the facts of this case, we cannot say that the instructions would be "probably responsible for an incorrect verdict, leading to substantial injustice." *Id.* There was overwhelming evidence showing that Prather had actual knowledge of the illegal purposes for which his product was used. Indeed, the jury found him guilty on this basis with respect to nine counts of the indictment. Based upon this record, and in light of the jury verdicts finding knowledge during the time frame both before and after the conduct charged in Count Seven, we find that there was no plain error in instructing the jury.

III. *Exclusion of Taped Testimony*

Finally, Prather contends that the district court erred in refusing to allow him to use a tape-recorded conversation in *1272 his cross-examination of government witness Matta either as impeachment evidence or to refresh Matta's recollection. The district court refused to admit the tape recording in evidence because Prather had violated the Rule 16 pre-trial discovery order by neglecting to disclose the existence of the tape to the prosecution. We note initially that Prather neither sought an opportunity to permit Matta to review the recorded testimony privately to refresh his recollection,

nor made the trial judge aware that this was the nature of his objection. Rather, he sought only to play the tape in question before the jury. Based on this record, we conclude that the district court judge did not abuse his discretion by excluding the tape recording as a sanction for failing to comply with the discovery order. Moreover, even if the judge abused his discretion by failing to allow the evidence for the purpose of refreshing Matta's recollection, the error did not affect Prather's substantial rights or violate Prather's Confrontation Clause rights. "A defendant's confrontation rights are satisfied when the cross-examination permitted exposes the jury to the facts sufficient to evaluate the credibility of the witnesses and enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable." *Mills v. Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998). Prather had ample opportunity, which he utilized, to impeach Matta's credibility by, among other methods, eliciting both testimony about Matta's plea agreement with the government, and admissions that Matta "may have" made statements to investigators and government agents attesting to Prather's law abiding nature. The jurors had sufficient cross-examination testimony and evidence before them to enable them to judge the credibility of Matta as a government witness.

IV. *Special Assessment Amount*

Both parties agree that the district court erred in levying a special assessment of $100 per count against Prather pursuant to 18 U.S.C. § 3013(a)(2)(A). The statutory special assessment amount for the crimes of which Prather was convicted was raised from $50 to $100 for offenses taking place on or after April 24, 1996.

Although Prather was convicted after that date, all of the offenses of which he was convicted were committed prior to that date. Because the Ex Post Facto Clause of the Constitution forbids retroactive application of criminal sanctions, we vacate the special assessment and remand for recalculation at the rate of $50 per count.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED for recalculation of the special assessment.

APPENDIX B

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR 28 00
THOMAS K. KAHN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-9094-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VERNON VICTOR PRATHER, Jr.,
a.k.a. "Billy",

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

BEFORE: CARNES, BARKETT, and MARCUS, Circuit Judges.

PER CURIAM:
The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active

service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
s/Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

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(6/95)

(companion order appears on following page of this Appendix)

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR 28 00
THOMAS K. KAHN
CLERK

UNITED STATES COURT OF APPEALS
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Defendant-Appellant.

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for the Northern District of Georgia

BEFORE: CARNES, BARKETT, and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for rehearing filed by Appellant, Prather, is DENIED.

ENTERED FOR THE COURT:
s/Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

ORD-41